NO. 96-1514

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

IN RE: JOE CONTE TOYOTA, INC.,
Debtor

JOSEPH P. CONTE, JR.,
Petitioner

versus

JOE CONTE TOYOTA, INC.
Respondent

IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 6, 1995, Joe Conte Toyota, Inc. ("Conte Toyota" or "Debtor") filed a Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code. The case is entitled *In re: Joe Conte Toyota, Inc.* and is pending under case number 95-12055 ("Bankruptcy Case") in the United States Bankruptcy Court for the Eastern District of Louisiana ("Bankruptcy Court"). At the time of the bankruptcy filing, Debtor was involved in litigation pending in the Civil District Court for the Parish of Orleans, State of Louisiana ("State Court") in proceedings entitled *Joe Conte Toyota, Inc.; Joseph P. Conte Family Trust; and Joseph P. Conte, Jr. v. Toyota Motor Sales U.S.A., Inc.; Gulf States Toyota, Inc.; John Bishop; J. H. Pyle; Robert Skillern; Toyota Motor Credit Corporation; J. B. McCullough; and the Louisiana Motor Vehicle Commission* (hereinafter the defendants are collectively referred to as "Toyota Defendants" and the aforedescribed suit the "Lawsuit") under case no. 93-23501, division M.[1]

On September 15, 1995, Debtor filed, in its Bankruptcy Case, a Motion for Authority to Compromise Claim requesting authority to settle the Lawsuit.[2] On November 2, 1995, the Bankruptcy Court approved the compromise issuing an Order ("Compromise Order") and Reasons for Order ("Reasons"). Joseph P. Conte, Jr. ("Conte") appealed to the

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[1] Designation of Record on Appeal to Fifth Cir., Record 19 at Exhibit 20, Attachment C, p.2.

[2] Record 19 at Exhibit 9.

United States District Court for the Eastern District of Louisiana ("District Court") which on April 16, 1996 granted a Motion to Dismiss Appeal filed by Conte Toyota on the ground of mootness. Conte next appealed the dismissal to the United States Fifth Circuit Court of Appeals ("Fifth Circuit") which affirmed the District Court's dismissal on December 13, 1996.[3]

B. FACTS OF THE CASE

On December 22, 1993 Conte Toyota; the Joseph P. Conte Family Trust ("Conte Trust"); and J. Conte filed the Lawsuit alleging one or more of the Toyota Defendants had breached Conte Toyota's Dealer Sales and Service Agreement ("Franchise Agreement") as well as other causes of action. The Toyota Defendants responded with counterclaims and affirmative defenses against the Debtor.

On June 7, 1995, Conte Toyota filed a Voluntary Petition for relief under Chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court.[4]

Prior to its bankruptcy filing, Conte Toyota had contracted with Troy Duhon a/k/a Pinnacle Automotive, Inc. (hereinafter "Duhon") to purchase substantially all of the corporeal assets of Conte Toyota as well as whatever rights Conte Toyota had in its Franchise Agreement. The sale also required the issuance of a new Dealer Sales and Service Agreement in Duhon's name in order to complete the transfer

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[3] *See* Petitioner's Appendix A, Opinion of Fifth Circuit Court.

[4] *See* Petitioner's Appendix A, Opinion of Fifth Circuit Court.

(hereinafter the "Duhon Sale"). Initially, Debtor contemplated a liquidation of its assets through the Duhon Sale, distribution of proceeds received to satisfy claims, and use of residual funds to prosecute the Lawsuit.[5]

The Toyota Defendants objected to the Duhon Sale on the ground that the Franchise Agreement had been previously terminated as a result of prepetition breaches and could not be transferred by the Debtor. Additionally, the Toyota Defendants argued that even if viable, the Franchise Agreement would shortly expire by its own terms, and the Bankruptcy Court was without authority to order the gran-

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[5] Record at 53, 57. Through the Duhon Sale initially appeared sufficient to satisfy these goals, upon investigation by counsel, it was discovered that the claims against Debtor were three times those initially reported by J. Conte. Additionally, Debtor was operating at a sizeable loss each month and post petition financing or shareholder infusions of capital were unavailable to sustain either operations or the cost of litigation. As a result, the Duhon Sale, even if completed over the Toyota Defendants objection, would not have accomplished the goal of providing necessary cash to support the Lawsuit. Additionally, counterclaims against the Debtor by Toyota Motor Credit Corporation raised the possibility of substantially increasing Debtor's unsecured class.

Aside from the cost to bring to trial, Debtor's chance of success on the merits of the lawsuit was highly uncertain. The Lawsuit was in a very poor posture for success on the merits at the time bankruptcy was filed. Because of a lack of funding, little discovery had been conducted. Debtor's own records were incomplete and unable to support its case. Debtor's trial attorneys had not been paid and withdrew summarily from the case one (1) week after the bankruptcy filing. These factors alone put success on the merits of the Lawsuit in serious question. Furthermore, the expiration of Debtor's Franchise Agreement was approximately nine (9) months from the date of the bankruptcy filing. For obvious reasons a renewal by GST was not expected. if its Franchise Agreement were allowed to expire, the value of Debtor's assets would dramatically fall. The failure of the Lawsuit and the potential expiration of the Franchise Agreement would have left the Debtor with little ability to pay creditors.

ting of a new franchise agreement to Duhon upon its termination.[6]

Due to the substantial time and expense necessary to conclude the Lawsuit as well as the risk of adverse judgment and the impact the litigation would have on the pending sale and confirmation of Debtor's plan, Debtor negotiated a settlement of the Lawsuit in exchange for the Toyota Defendants agreement to (i) accept Duhon as an approved dealer; (ii) issue Duhon a new franchise agreement upon the completion of the Duhon Sale; (iii) pay Debtor monetary damages; and (iv) release all claims against totaling in excess of $300,000.00. In exchange for these concessions, Debtor agreed to release its claims against the Toyota Defendants including those asserted in the Lawsuit (hereinafter the "Toyota Settlement").[7]

On October 5, 1995, a hearing was held in the Bankruptcy Court on a Motion for Order on Compromise filed by Debtor ("Motion").[8] The Motion incorporated the terms of the Toyota Settlement. By Order entered on November 2, 1995, the Bankruptcy Court approved the terms of the Toyota Settlement and authorized Debtor to enter into same.[9]

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[6] Record at 46. GST's position that the Franchise Agreement had been terminated pre-petition made transfer of the existing Franchise Agreement uncertain. Even if transfer of the Franchise Agreement could have been ordered by the Bankruptcy Court, the issuance of a *new* franchise agreement to Duhon was less certain and would have required extensive litigation.

[7] Record 19 at Exhibits 9-10.

[8] Record at 252, 19 at Exhibits 12, 16, 25, 27, 29.

[9] Record 19, Exhibits 9, 10.

On November 8, 1995, Debtor obtained an order of confirmation on its plan of reorganization (hereinafter "Order on Confirmation"). The plan incorporated the terms of the Toyota Settlement, spefically the sale of certain assets of Debtor to Duhon, the transfer to Duhon of all of its rights under the Dealer Sales and Service Agreement, and the issuance of a new Dealer Sales and Service Agreement to Duhon by the Toyota Defendants. The plan was the culmination of the terms of the Toyota Settlement and required by the terms of the compromise previously ordered by the Bankruptcy Court.[10]

No objection was filed to confirmation of the plan nor has an appeal been taken from the Order of Confirmation.[11]

On November 15, 1995, Acts of Credit Sale with Reservation of Vendor's Privilege and of Settlement were executed by the Debtor, Toyota Defendants, and Duhon effectuating the terms of the Toyota Settlement and plan. As a result of the plan's confirmation, Compromise Order, and this closing the following occurred:

(1) Proofs of Claim filed by GST and TMCC have been stricken from the record and the claimants have waived their rights to receive payment from Debtor on same;

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[10] Record at 31.

[11] Under the terms of the plan filed previous to the Toyota Settlement, Debtor contemplated continuation of any litigation pending at confirmation. The plan also provided that post confirmation Debtor was free to settle any existing litigation without the necessity of Court approval. Record at 46, Plan of Reorganization Article VII, p. 20, Section 7.01; First Amended Disclosure Statement, Article IV, p. 16, Section C.

(2) The Lawsuit has been dismissed, with prejudice, as to all parties;[12]
(3) The Toyota Defendants paid $100,000.00 to Debtor in settlement;
(4) GST and Toyota Motor Sales, Inc. (hereinafter "TMS") granted a Dealer Sales and Service Agreement in favor of Duhon for a Toyota franchise succeeding Conte Toyota on same;
(5) The Debtor delivered substantially all of its physical assets to Duhon in exchange for payment of $772,788.54; and
(6) Distributions have been made satisfying over $872,788.54 in allowed claims held against Debtor.[13]

On November 2, 1995, J. Conte (hereinafter "Conte") filed a Motion for Leave to Appeal Order on Compromise (hereinafter the "Appeal"). The Appeal did not request a stay of the Compromise Order nor has a stay been subsequently requested or ordered.[14]

Debtor has transferred all of the property proposed for transfer by its plan and has few, if any, assets remaining. The plan has been substantially consumated and the case is approaching a point of closure.[15]

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[12] Previous to bankruptcy filing, the Toyota Defendants had obtained dismissal of the claims asserted by the Conte Trust, Joseph P. Conte, and Doris C. Conte. This decision was appealed and affirmed by the Louisiana Fourth Circuit Court of Appeals in an action entitled *Joe Conte Toyota, Inc. et. al. v. Toyota Motor Sales, Inc. et. al.* under proceeding number 95-CA-1630.

[13] Record at 19, Exhibit 7 and 20. *See* also Original Brief filed on Behalf of Appellant, p. 22.

[14] Record at 267.

[15] Record at 19, Exhibit 12.

SUMMARY OF ARGUMENT

There is no difference in the Circuits' application of the standard of mootness nor has the Fifth Circuit denied that modification of a plan, where appropriate and feasible, can be implemented in order to award the relief requested. The matters before this Court are none the less subject to the doctrine of mootness because to maintain the appeal would jeopardize the plan of reorganization and the rights of third parties not before the Court.

LAW AND ARGUMENT

A. The Application Of The "bankruptcy mootness rule" By The Fifth Circuit Is Not In Conflict With Other Courts.

Conte argues that the Fifth and Eleventh Circuits differ and are in substantial conflict over the application of doctrine of mootness. As authority for his assertion Conte provides that the Eleventh Circuit utilizes additional factors to those set forth *In Re: Manges,* 29 F.3d 1034 (5th Cir. 1994) and cited by the Fifth Circuit in its opinion. To support his claim, Conte cites a footnote contained in *First Union Real Estate and Mort. Inv. v. Club Assoc.,* 956 F.2d 1065 (11th Cir. 1992). The *First Union* decision does not expand the considerations involving a determination of mootness, but instead indicates that within those factors subsidiary points may be considered. Therefore they are in fact consumed within the factors contained and considered by the Fifth Circuit.

Practically, Conte's argument also fails because all these subsidiary factors were actually argued to the District

Court and Fifth Circuit by both Conte and Conte Toyota. There is nothing to suggest that these facts were not considered by the Appellate Court and incorporated into it's ruling. Certainly, they were not excluded from the record or affirmatively stricken. Conte Toyota therefore believes that the Fifth Circuit had all the facts before it which Conte now complains were not previously considered. Whether or not specifically acknowledged, the Court did not arrive at its ruling without both parties presenting to it the points for consideration that Conte wishes to reurge. For this reason, Conte can not claim that the standard utilized by the Fifth Circuit in applying the doctrine of mootness is any different than that of the Eleventh Circuit. Conte Toyota maintains that they are the same.

B. The Fifth Circuit Did Not Hold That Portions Of A Confirmed Plan May Not Be Modified On Appeal

Conte argues that the Fifth Circuit's position on partial modification of a plan on appeal is in conflict with other circuits. The opinion of the Fifth Circuit does not support this charge. The Fifth Circuit held that the compromise *could not* be reversed because of substantial consummation of the plan. The Fifth Circuit specifically wrote, "[B]ecause the plan has been substantially consummated, the relief requested by Conte would affect the rights of third parties not before the court and destroy the success of the plan." This statement is not a denial that in some circumstances modification of a confirmed plan may be permitted in order to grant the relief requested, but instead an acknowledgment that when the modification requested threatens the very success of a plan and the intervening rights of third parties, the mootness doctrine dictates a dismissal of the matter on appeal. The Fifth Circuit clearly recognized that to avoid the compromise is to avoid the plan.

C. Conte Is Not Entitled To A Review Of The Bankruptcy Court's Finding Regarding The Ownership Interest in Debtor

Conte argues that consideration of the Bankruptcy Court's finding of fact regarding ownership in Debtor is a justiciable issue upon which relief can be granted. In his writ application, Conte admits that this issue was critical to approval of the compromise.[16] Conte fails to recognize that the question before the court is not the justiciability of the issues presented, but the impact an adverse decision on same would have on third parties not before the court and the Debtor's plan.

Conte now seeks to carve out the issue as to the relative ownership interests in the Debtor on the premise that its consideration will not affect the ruling of the Bankruptcy Court on the Compromise nor affect the plan. The compromise, plan and implementation of same were accomplished through the authority of the Board of Directors of Conte Toyota. Conte seeks to challenge that authority by attacking the ownership percentages determined by the Court. If ownership in Conte Toyota is as Conte asserts, then was the Motion to Compromise properly before the Court? Did the parties in interest, in reliance on the findings by the Bankruptcy Court, improperly confirm and implement the plan? If the answer is yes, then the review of this one fact finding will result in a collateral attack on all the resulting orders (including that

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[16] In footnote 3, Conte admits that the court considered and "ignored the reality that if Mr. Conte's assertions were correct, petitioner had the right to withdraw the "Motion to Compromise." No party other than Joe Conte Toyota, Inc. had joined in the Motion. Under these circumstances, it is unclear what jurisdiction the bankruptcy court would have had to proceed with the hearing."

of confirmation of the plan) and again jeopardize the rights of parties not before this Court.

Decision on this issue was necessary to the approval of the compromise and ultimately confirmation of the plan. Because it went to the heart of Debtor's reorganization, it can not be considered a tangential issue not critical to all that came before or after its resolution. Control of the Debtor and the path upon which reorganization was sought was the ultimate issue before the court. Conte properly lost the battle for control both before the Board and in the lower Courts, but continues to seek any avenue to unwind the compromise. His argument that the reconsideration of the relative ownership interests in the Debtor will have no effect on events, court orders, or other parties is disingenuous. A reversal on this issue alone sets the stage for a complete collateral attack on all events following, including those already deemed by two lower courts as affecting the rights of parties not before this Court and jeopardizing the successful liquidation of Conte Toyota. Therefore, the determination of the relative ownership interests in the Debtor is also moot for the reasons assigned.

CONCLUSION

The Appeal by Conte is moot because irreversible events have occurred which have resulted in the Court being powerless to fashion the requested relief. To grant the relief requested by J. Conte, this Court would have to (i) avoid the settlement agreement executed between the Debtor and the Toyota Defendants; (ii) revive the Lawsuit; (iii) revive claims held by the Toyota Defendants in the Joe Conte Toyota Bankruptcy; (iv) avoid the Duhon Sale; (v) cancel Duhon's Franchise Agreement; (vi) return the sale and settlement proceeds to the parties; (vii) collect the assets sold to Duhon; and (viii) recover the funds paid on claims owed by Debtor.

The jurisprudence recognizes the fact that there is a point beyond which an Appellant Court cannot order fundamental changes in reorganization. Conte Toyota submits that such a point has been reached for if the dismissal of the Appeal by Conte were overturned, each of the above enumerated events would have to be undone. It is clearly too late for such fundamental changes; therefore, dismissal of the Appeal should be upheld.

DATE: 4/14/97 Respectfully submitted:

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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Brief in Response to Petition for Writ of Certiorari has been served on the following party by United States Mail, postage prepaid and properly addressed this 14th day of April, 1997:

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